

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, practices, and conduct of Pacific Bell Wireless LLC dba Cingular Wireless, U-3060, U-4135 and U-4314, and related entities (collectively "Cingular") to determine whether Cingular has violated the laws, rules and regulations of this State in its sale of cellular telephone equipment and service and its collection of an Early Termination Fee and other penalties from consumers.

Investigation 02-06-003
(Filed June 6, 2002)

**JOINT RULING OF ASSIGNED COMMISSIONER AND
ADMINISTRATIVE LAW JUDGE
DENYING PETITION TO REOPEN THE RECORD**

Summary

This joint ruling denies the petition of the Commission's Consumer Protection and Safety Division (CPSD) to reopen the evidentiary record for the admission of portions of the deposition transcripts of four Cingular employees, totaling approximately 130 pages of text.

Background

In accordance with the schedule set prior to the adjournment of hearings, on April 28, 2003, CPSD filed the petition. At the direction of the administrative law judge (ALJ), on May 5, CPSD filed a supplemental brief in support of the petition. On May 7, Cingular Wireless (Cingular) filed a response in opposition.

Discussion

CPSD seeks to reopen the record for the admission, as late-filed exhibits, of parts of the deposition transcripts of these four Cingular employees: Dennis Ramos; David Scharafian; Daryl Evans; and Steve Sitton.¹

In response to discussion at hearing, the assigned ALJ stated that any petition to re-open the record must meet the following standards: "The burden you must overcome is for a showing that this evidence is needed, is material, that it will not burden the record to receive it, and you must explain why it was not offered during the course of the proceeding." (Tr. 1429: 9-15.)

CPSD's Showing

CPSD's petition argues that: (1) § 2025(u) of the Code of Civil Procedure,² which provides the manner in which depositions may be used "at trial or other

¹ The specific pages which CPSD seeks to introduce into the record are: Sitton pages 174-175, 189, 192-194, 199, 204-205, 232-233, 235-242; Scharafian pages 78, 102-106, 108-110, 113-117, 122, 127-129, 132, 135-136; Evans pages 39-40, 54-67, 83-88, 124-129; and Ramos pages 25-26, 60-61, 67-69, 133-135 (Ramos discussing maps found as Attachment 6 to Zicker opening testimony).

² In pertinent part, Code C.v. Proc. § 2025(u) provides:

At the trial or any other hearing in the action, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition, or who had due notice of the deposition and did not serve a valid objection under subdivision (g), so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with the following provisions:

....

(2) An adverse party may use for any purpose, a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee under subdivision (d) of a party. It is not ground

Footnote continued on next page

hearing in the action,” authorizes admission of these deposition excerpts as late-filed exhibits; (2) admission would not burden the record but “would in fact draw into sharper focus the operations of a complex, multivalent corporation with \$14 billion/year in revenue and both national and California operations affecting California customers” (Petition at 4); (3) “CPSD spent considerable money, time and effort in building a deposition record” (*Id.*); and (4) the transcripts were previously offered at hearing as attachments to the prepared testimony of CPSD’s witnesses.³

CPSD’s supplemental brief argues that the material should be admitted because it is relevant and may be necessary but that “[i]t is difficult to predict in advance what proof will be necessary to the trier of fact” and “[h]ow a matter is briefed post-hearing could also have bearing on the necessity of given testimony.” (Supplemental Brief at 1.) The supplemental brief does explain in somewhat greater detail why CPSD believes that these deposition excerpts are important, but it does

for objection to the use of a deposition of a party under this paragraph by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing.

....

(5) Subject to the requirements of this section, a party may offer in evidence *all or any part of a deposition*, and if the party introduces only part of the deposition, any other party may introduce any other parts that are relevant to the parts introduced.

³ Several weeks before the start of hearings, the ALJ advised all parties that she would not permit the wholesale attachment to their own witnesses prepared testimony of the deposition transcripts, or lengthy excerpts of the depositions transcripts of other individuals (some identified as witnesses in this proceeding and others, not). All parties had engaged in this practice (not only CPSD), ostensibly as support for one or more statements in the prepared testimony but typically without reference to any specific page or line in the deposition transcript. The ALJ directed all parties to remove the transcripts from the prepared testimony.

not explain how the record is inadequate without their admission. CPSD makes these arguments:

Ramos: the deposition excerpts “make more specific the extent of Cingular’s knowledge about coverage holes in its system, and are *relevant to the credibility (or lack thereof) of other witnesses’ statements* about Cingular’s network. *Cingular’s knowledge of coverage holes within its system has been generally conceded by Cingular*, but Cingular has fought strenuously to keep the specifics and scope of such knowledge out of the record [fn omitted].” (Supplemental Brief at 4, emphasis added.)

Mr. Ramos did not testify at hearing and CPSD does not explain why his testimony should be afforded greater weight than those who were witnesses.

Sharafian: the deposition excerpts relate to statements in the prepared testimony of CPSD’s witness Zicker (e.g., “Cingular’s David Sharafian also confirmed that a majority of 28 specific addresses provided by CPSD/UCAN were in coverage holes [citation omitted].”) The deposition transcript “provides detailed testimony about those addresses that Mr. Sharafian *admitted* were without coverage.” (*Id.*) CPSD does not argue that Zicker’s testimony on this point was challenged but states that the deposition transcripts “may be necessary to determination of issues herein.” (*Id.* at 5.) As Cingular’s response points out, given the concession, further proof is unnecessary.

Evans: though CPSD contends that Evans was the most qualified Cingular employee on the subject of advertising, CPSD did not call Evans as an adverse witness.⁴ The supplemental brief references several passages from Evans’ deposition but simply argues that they are relevant and “offer the unique Cingular-

⁴ According to Cingular’s opposition, CPSD did issue a Notice to Appear at hearing to Ramos, Sharafian, Evans and Sitton. Cingular objected to producing these witnesses and CPSD did not move to compel their attendance.

internal perspective.” (*Id.*) In one referenced exchange (in the course of examination by UCAN, not CPSD), Evans discusses Cingular’s “‘whenever, wherever’ advertisement” and concedes that it is not “literally true” that one can talk whenever, wherever. (*Id.* at 6.) Such an admission adds little, given Cingular’s concession that coverage holes exist on its system.

Sitton: the deposition excerpts provide “more proof” on issues of Cingular’s control over its agents and its agents’ sales practices, including disclosures. (*Id.* at 7.)

The Petition Should be Denied

These arguments are far from compelling. A petition to reopen the evidentiary record, once hearings have adjourned, is an extraordinary measure, not unlike a petition to set aside submission pursuant to Rule 84 of the Commission’s Rules of Practice and Procedure. The only significant difference is that Rule 84 applies post-submission and since the schedule for this proceeding provides for submission upon the filing of reply briefs, this proceeding has not been submitted. Under the recently revised briefing schedule, opening briefs are due very soon, however, on May 19, 2003.

We do not find that Code Civ. Proc. § 2025(u) requires the use of depositions as late-filed exhibits in lieu of calling the deponents as adverse witnesses at hearing. At hearing an adverse party may use another party’s deposition in several ways, including examination of the deponent or other witnesses. Admission of a deposition transcript in lieu of live examination after adjournment of the hearing raises a number of problems, particularly where the transcript purportedly challenges the credibility or veracity of some witness at the hearing. The question of fairness is one such problem. But even if fairness is not an issue (in cases, for example, where no party contests admission of the

deposition in that way), this practice limits the Commission's ability to weigh the evidence because it prevents the Commission from assessing the deponent's credibility and veracity or from asking any clarifying questions. Where the evidence—including the deposition passage—is heavily disputed, a reading exercise simply does not suffice.

With respect to fairness, CPSD suggests that if we grant the petition, we may allow Cingular (and UCAN as well) to designate portions of these or other deposition transcripts for submission as additional late-filed exhibits. Cingular's response states that if we grant CPSD's petition, it will ask for that opportunity. (CPSD does not suggest additional hearings, nor does Cingular request them).

Additional rounds of designation create a moving target as far as fixing the evidentiary record, and threaten the current briefing schedule. CPSD has not established that we need to go there. Critically, CPSD was not prevented from using the depositions at hearing through cross-examination. Both UCAN and Cingular did use depositions in that way. Moreover, CPSD has shown no compelling need for the evidence. Unnecessarily cumulative evidence burdens the record without providing meaningful proof.

In the course of nine days of hearing, the Commission heard testimony from more than 15 witnesses and received in evidence nearly 100 documentary exhibits, many with multiple attachments. CPSD has not established that we should reopen the record to add these depositions transcripts to it.

IT IS RULED that the April 28, 2003, petition of the Commission's Consumer Protection and Safety Division (CPSD) to reopen the record, as supplemented by CPSD's May 7, 2003 supplemental brief, is denied.

Dated May 12, 2003, at San Francisco, California.

/s/ CARL WOOD

Carl Wood
Assigned Commissioner

/s/ JEAN VIETH

Jean Vieth
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Joint Ruling of Assigned Commissioner and Administrative Law Judge Denying Petition to Reopen the Record on all parties of record in this proceeding or their attorneys of record. In addition, service was also performed by electronic mail.

Dated May 12, 2003, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.